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Marc L. Fleischauer

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# TEETH FOR A PAPER TIGER: A PROPOSAL TO ADD ENFORCEABILITY TO FLORIDA'S HATE CRIMES ACT

MARC L. FLEISCHAUER

"[I] thought it would be 'motherhood and apple pie': a simple issue," said Representative Jim King at the signing of the surprisingly controversial bill he co-authored.<sup>1</sup> Committee Substitute for House Bill 1112, threateningly referred to as the "Hate Crimes Act," became effective October 1, 1989.<sup>2</sup> This Act enhances criminal penalties for offenders motivated by racial, ethnic or religious prejudices.<sup>3</sup> Representative King sponsored the Act at the request of minority colleagues in the House.<sup>4</sup> The Anti-Defamation League of B'nai B'rith, a Jewish rights group, lobbied strongly for the Act.<sup>5</sup>

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1. Signing of CS for HB 1112 (1989) by Governor Robert Martinez, tape recording of proceedings (June 26, 1989) (tape on file with Gov.'s Press Off.) (statement of Rep. James E. "Jim" King, Repub., Jacksonville) [hereinafter Signing Ceremony].

2. Ch. 89-133, § 2, 1989 Fla. Laws 381, 381. As codified, the statute provides:

775.085 Evidencing prejudice while committing offense; enhanced penalties.—

(1) The penalty for any felony or misdemeanor shall be reclassified as provided in this subsection if the commission of such felony or misdemeanor evidences prejudice based on the race, color, ancestry, ethnicity, religion, or national origin of the victim:

(a) A misdemeanor of the second degree shall be punishable as if it were a misdemeanor of the first degree.

(b) A misdemeanor of the first degree shall be punishable as if it were a felony of the third degree.

(c) A felony of the third degree shall be punishable as if it were a felony of the second degree.

(d) A felony of the second degree shall be punishable as if it were a felony of the first degree.

(2) A person or organization which establishes by clear and convincing evidence that it has been coerced, intimidated, or threatened in violation of this section shall have a civil cause of action for treble damages, an injunction, or any other appropriate relief in law or in equity. Upon prevailing in such civil action, the plaintiff may recover reasonable attorney's fees and costs.

FLA. STAT. § 775.085 (1989).

3. See ch. 89-133, § 1, 1989 Fla. Laws 381, 381 (codified at FLA. STAT. § 775.085(1) (1989)).

4. Letter from Rep. King to Marc Fleischauer (July 19, 1989) (explaining CS for HB 1112) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.). This form letter was provided in a packet of information compiled by Representative King's legislative staff.

5. See Signing Ceremony, *supra* note 1 (statements of Arthur N. Teitlebaum, So. Area Dir. for the Anti-Defamation League of B'nai B'rith).

Until the Act was passed, according to the House of Representatives Criminal Justice Committee, Florida law did not provide for an enhancement of penalties for crimes motivated by prejudice.<sup>6</sup> However, since 1951 Florida has prohibited as misdemeanors certain practices normally associated with organized racism.<sup>7</sup> These activities include the wearing of hoods or masks on public property,<sup>8</sup> on another's private property,<sup>9</sup> or at demonstrations on private property without written permission from the owner.<sup>10</sup> These provisions apply only if the hood or mask is worn with the intent to deprive any person or class of persons of equal protection by force or threat of force.<sup>11</sup>

When House Bill 1112 was introduced, legislators received threats ranging from removal from office to death.<sup>12</sup> Immediately prior to the signing ceremony, Representative King mentioned that he was troubled by the articulate nature of threatening letters he had received and by the belief of the letters' authors that they are adhering to some logical framework.<sup>13</sup> Florida's racist movement is not limited to a few uneducated backwoods rednecks. Racist hatred and fear have apparently permeated the minds of well-educated, successful urbanites who are able to articulate their warped philosophies to legislators.

In light of the prejudice and hatred expressed by opponents of the Act, one should be surprised at the commotion made over such a benign piece of legislation. The real surprise is that this Act, far from meeting the high expectations of its proponents, may actually harm those social groups it was designed to protect. This Comment suggests specific legislative amendments to the Act, designed to close its loopholes and mold the Act into a useful, powerful tool for Florida.

## I. COMPARABLE LEGISLATION

The Hate Crimes Act is a unique concept to Florida. However, similar enactments have occurred in other states.<sup>14</sup> Oregon's 1981 law cre-

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6. Staff of Fla. H.R. Comm. on Crim. Just., CS for HB 1112 (1989) Staff Analysis 1 (final June 6, 1989) (on file with committee) [hereinafter Staff Analysis for CS for HB 1112].

7. See generally FLA. STAT. §§ 876.13-.21 (1951) (prohibiting the wearing of masks under certain circumstances, the burning of crosses and placing of exhibits with the intent to intimidate).

8. *Id.* § 876.13.

9. *Id.* § 876.14.

10. *Id.* § 876.15.

11. *Id.* § 876.155 (1981).

12. Letter from Rep. King, *supra* note 4.

13. See Signing Ceremony, *supra* note 1 (conversational statements by Rep. King prior to ceremony).

14. See CAL. PENAL CODE §§ 422.6-.7 (West 1988) (punishing interference with another's constitutional rights on the basis of the victim's race, color, religion, ancestry, national origin,

ating the crimes of first- and second-degree intimidation is probably the best-researched parallel to Florida's new law.<sup>15</sup> Oregon specifically

or sexual orientation); CONN. GEN. STAT. ANN. §§ 46a-58 (West 1986) (punishing interference with another's constitutional rights, desecration of property and the burning of crosses without permission from property owner when motivated by victim's religion, national origin, alienage, color, race, sex, blindness or physical disability); MASS. GEN. L. ch. 265, § 39 (Supp. 1988) (punishing assault and/or battery of a person because of the person's race, color, religion, or national origin); N.Y. PENAL LAW §§ 240.30-.31 (McKinney 1980 & Supp. 1989) (punishing a physical attack, attempt to attack, or even threat to attack a person because of that person's race, religion, or national origin); OKLA. STAT. ANN. tit. 21, § 850 (West Supp. 1989) (prescribing civil and criminal penalties for malicious intimidation or harassment because of victim's race, color, religion, ancestry, national origin or disability); OR. REV. STAT. §§ 166.155, .165 (1985 & Supp. 1988) (creating crimes of first- and second-degree intimidation for crimes motivated by considerations of victim's race, color, religion, or national origin); 18 PA. CONS. STAT. ANN. § 2710 (Purdon 1983) (classifying a variety of offenses one degree higher if they are motivated by hatred of victim's race, color, religion, ancestry, national origin); WASH. REV. CODE ANN. § 9A.36.080 (1988 & Supp. 1989) (creating civil and criminal actions for "malicious harassment" motivated by victim's race, color, religion, ancestry, national origin, or mental, physical, or sensory handicap); W. VA. CODE § 61-6-21 (Supp. 1989) (punishing perpetrators for crimes committed because of victim's race, color, religion, ancestry, national origin, political affiliation, or sex).

15. Article, *Racial and Religious Intimidation: An Analysis of Oregon's 1981 Law*, 18 WIL-LAMETTE L. REV. 197, 197 n.7 (1982) (authored by Helen L. Mazur-Hart). The 1981 Oregon law provided:

SECTION 1. (1) A person commits the crime of intimidation in the second degree if, by reason of the race, color, religion or national origin of another person, the person violates ORS 164.345 or 166.065.

(2) Intimidation in the second degree is a Class A misdemeanor.

SECTION 2. (1) Two or more persons acting together commit the crime of intimidation in the first degree, if the persons by reason of the race, color, religion or national origin of another person, violate ORS 163.160, 163.190, 164.345 or 166.065.

(2) Intimidation in the first degree is a Class C felony.

SECTION 3. (1) Irrespective of any criminal prosecution or the result thereof, any person injured by a violation of section 1 or 2 of this Act shall have a civil action to secure an injunction, damages or other appropriate relief against any and all persons whose actions are unlawful under this Act.

(2) Upon prevailing in such action, the plaintiff may recover:

- (a) Both special and general damages, including damages for emotional distress;
- (b) Punitive damages; and
- (c) Reasonable attorney fees and costs.

(3) The parent, parents or legal guardian of an unemancipated minor shall be liable for any judgment recovered against such minor under this section, in an amount not to exceed \$5,000.

SECTION 4. If any district attorney has reasonable cause to believe that any person or group of persons is engaged in violation of section 1 or 2 of this Act, the district attorney may bring a civil claim for relief in the appropriate court, setting forth facts pertaining to such violation, and request such relief as may be necessary to restrain or prevent such violation. Any claim for relief under this section does not prevent any person from seeking any other remedy otherwise available under law.

SECTION 5. This Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this Act takes effect on its passage.

*Id.* (quoting 1981 Or. Laws 785).

increases the penalties for the commission of four underlying crimes<sup>16</sup> when they are committed by reason of the race, color, religion or national origin of the victim.

In its original form, section 166.155(1), Oregon Revised Statutes, stated: "A person commits the crime of intimidation in the second degree if, by reason of race, color, religion or national origin of another person, the person violates ORS 164.345 [criminal mischief] or ORS 166.065 [harassment]."<sup>17</sup> Similarly, section 166.165, Oregon Revised Statutes, originally reclassified the commission by two or more persons of "ORS 163.160 [assault] or ORS 163.190 [menacing]" by reason of race, color, religion or national origin as intimidation in the first degree.<sup>18</sup> Since 1983, both statutes have been revised to remove the awkward cross-references.<sup>19</sup> The elements of the underlying crimes were simply added to the elements of first- and second-degree intimidation.

Like Florida's new law, Oregon's law places on the prosecutor the burden of proving a defendant's "reason" for committing the underlying crime. While Oregon's statute survived judicial scrutiny on constitutional grounds in *State v. Beebe*,<sup>20</sup> early predictions of the law's lack of application apparently were accurate.<sup>21</sup>

In *Beebe*, the Court of Appeals of Oregon upheld the constitutionality of section 166.155, Oregon Revised Statutes, against a claim that the crime of second degree intimidation violated equal protection requirements.<sup>22</sup> The prosecution accused the defendant of throwing the complainant witness to the ground by reason of the latter's race.<sup>23</sup> The defendant moved to dismiss on the ground that the intimidation statute gave greater protection to a victim assaulted by reason of race than to victims assaulted for some other reason.<sup>24</sup>

The appellate court held that "[t]he legislature may legitimately determine that the danger to society from assaultive conduct directed

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16. OR. REV. STAT. § 164.345 (1985) (enhancing third-degree criminal mischief); *id.* § 166.065 (enhancing third-degree harassment); *id.* § 163.160 (enhancing fourth-degree assault); *id.* § 163.190 (enhancing fourth-degree menacing).

17. Article, *supra* note 15, at 197 n.7 (citing 1981 Or. Laws 785).

18. *Id.*

19. See OR. REV. STAT. §§ 166.155, .165 (1985 & Supp. 1988).

20. 67 Or. App. 738, 680 P.2d 11 (Or. Ct. App. 1984), *appeal denied*, 297 Or. 459, 683 P.2d 1372 (1984) (stating that the legislature may legitimately find that racially motivated violence jeopardizes the social welfare).

21. As of this writing, no other Oregon appellate case has cited the statute as being violated or applied.

22. *Beebe*, 67 Or. App. at 741, 680 P.2d at 13.

23. *Id.* at 740-41, 680 P.2d at 12-13.

24. *Id.* at 741-42, 680 P.2d at 13.

toward an individual because of his race, religion or national origin is greater than the danger from such conduct under other circumstances."<sup>25</sup> Hence, the *Beebe* court ruled that the Oregon Legislature could constitutionally enhance the penalty for racially motivated unlawful conduct.

Despite this success, the Oregon statute is rarely enforced. The lack of enforcement is probably due to the heavy burden placed on prosecutors to prove a defendant's motivation for committing a criminal act, which is required to trigger the intimidation statute. Unfortunately, this heavy burden also cripples Florida's Hate Crimes Act.

## II. FLORIDA'S HATE CRIMES ACT

The Hate Crimes Act applies to both criminal and civil actions. The Act enhances penalties for crimes committed under certain circumstances and creates a cause of action for treble damages in civil court.<sup>26</sup> The enhancement provision punishes misdemeanors and felonies as if they were committed one degree more severely by the offender.<sup>27</sup> Although the Act provides no clear *mens rea* or burden of proof necessary to trigger this reclassification, it elusively states that the increased penalty will be enforced for any crime which "evidences prejudice based on the race, color, ancestry, ethnicity, religion, or national origin of the victim."<sup>28</sup> Thus prosecutors face the difficult burden of proving not only the elements of the original crime and the disparate races or beliefs of the victim and the offender, but also that the reason or motivation for the crime itself was racist in nature. As one commentator wrote of the Oregon statute, "[i]t is difficult, if not impossible, for any tribunal to accurately identify an accused's motives at the time of the alleged offense."<sup>29</sup> In Oregon, "[a]mendments proposed by the legislature to aid the prosecution in proving the mental element of intimidation were summarily rejected. By default, therefore, the criteria for determining motive were left to the courts."<sup>30</sup>

Florida Attorney General Robert A. Butterworth recognizes the difficulty of identifying hate crimes even outside the meticulous court

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25. *Id.*

26. Ch. 89-133, § 1, 1989 Fla. Laws 381, 381 (codified at FLA. STAT. § 775.085 (1989)).

27. *Id.* (codified at FLA. STAT. § 775.085(1) (1989)).

28. *Id.*

29. Article, *supra* note 15, at 204.

30. *Id.* at 204-05.

setting.<sup>31</sup> In an interim report, Attorney General Butterworth relates that seventy-six hate crimes were reported by law enforcement officials during the first three months of the statute's enactment. Of these, law enforcement officials classified fifty-four offenses as being racially motivated, based on inspection of the crime scenes and interviews with victims and witnesses.<sup>32</sup> However, the report stated that these are "minimum" figures: "[e]xperience demonstrates that not all hate crimes are reported to the police, nor will all those reported be recognized as such."<sup>33</sup>

Florida legislators could show their commitment to human equality by venturing where the Oregon Legislature did not dare. Part I of this Proposal would alleviate the next-to-impossible prosecutorial burden of proving motive, without violating the rights of defendants, in the following manner: the addition of a statutory affirmative defense coupled with a mandatory presumption of racist motivation in all violent interracial crimes. This could be accomplished through an amendment to the current law.

Florida's Hate Crimes Act gives victims of racially motivated crimes a civil cause of action for treble damages, injunctive relief, and attorney fees.<sup>34</sup> The burden of proof for these civil remedies is clearer than that for the criminal penalty enhancement, but it may be so strict as to be wholly impractical: the complaining party must prove by "clear and convincing evidence that it has been coerced, intimidated, or threatened [by the defendant] in violation of this section."<sup>35</sup> In its staff analysis, the Criminal Justice Committee suggests that a "violation of this section" refers to committing a crime which "evidences prejudice";<sup>36</sup> hence, to collect civil damages, the plaintiff must show by clear and convincing *evidence* that the act *evidenced* prejudice. This tautology begs for clarification in any but the most extreme circumstances. For example, if a cross-burning on the property of a minority conducted by a hooded group shouting Klan slogans is a crime

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31. See Att'y Gen. Robert A. Butterworth, *Hate Crimes in Florida: Interim Report October 1, 1989—December 31, 1989*, 5 (1990) (noting that identification of criminal motivation made by law enforcement officials for record-keeping purposes "may initially be difficult and will require a combination of training and experience to produce accurate data") (on file with the Office of Att'y Gen.).

32. *Id.* at 6. The report contains a reproduction of the "Statistical Report Form" used by the Department of Law Enforcement to identify hate crimes. The form lists several potential indicators (e.g., symbols or words used during the crime) and activities (from cross burning to spitting) which would suggest the presence of prejudice. *Id.* at A-1.

33. *Id.* at 2.

34. Ch. 89-133, § 1, 1989 Fla. Laws 381, 381 (codified at FLA. STAT. § 775.085(2) (1989)).

35. *Id.*

36. Staff Analysis for CS for HB 1112, *supra* note 6, at 2.

which "evidences prejudice," can the same be said of an incident of a white schoolboy pushing a minority classmate from the water fountain while shouting racist obscenities? If a minority pushes a white for calling him by a racist name, should the white person be entitled to treble damages for the push?

The civil provision may be more effective and enforceable than the criminal provision in deterring racial violence because civil victims need not rely on prosecutorial discretion for their day in court. However, the lack of definition and the strict burden of proof for civil plaintiffs are likely to have only negative effects on attempts to interpret the ambiguities of the criminal enhancement provision. Is the last example of an interracial assault rightfully enhanced by a higher degree of punishment? Certainly, this kind of racial classification would serve no legitimate public purpose.<sup>37</sup>

Part II of this Proposal suggests that only criminal penalties involving white offenders and minority victims should be enhanced. Once the new Act is strengthened by Part I of this Proposal, it will be absolutely necessary to further amend the Act to exempt minority offenders from the presumption of racist intent in interracial crimes.<sup>38</sup> Under this part of the Proposal, courts would uphold penalty enhancements and treble civil damages against only non-minority offenders. It appears that such a result would not violate equal protection.

#### A. *Part I: Creating an Affirmative Defense*

Despite the remedial effect Committee Substitute for House Bill 1112 was intended to have on the relative respect given minorities in society, in the long run it may serve only to reinforce white supremacy in Florida.<sup>39</sup>

The Florida Department of Law Enforcement recognizes the difficulty of identifying racially biased crimes for record-keeping pur-

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37. A statute which discriminates on the basis of a suspect class, such as race, must serve a "compelling state interest." Note, *Combatting Racial Violence: A Legislative Proposal*, 101 HARV. L. REV. 1270, 1282-85 (1988); see, e.g., *United States v. Kras*, 409 U.S. 434, 446 (1973).

38. This Comment uses the term "race" to include "race, religion, ethnicity, color, ancestry and national origin." The necessity for an accurate yet flexible standard for classifying America's minorities makes this a difficult topic on which to theorize. Until better methods are proposed, singling out certain minority groups for special attention is, at least, a starting point from which others can continue. See Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 730 n.36 (1974) (regarding immutability as a basis of classification).

39. See letter from Rep. King, *supra* note 4, at 1-2 ("I know that we must send a message to the KKK, the Skinheads and the 'New Order' . . . and other 'hate' oriented groups, that we will not tolerate prejudicial violence in the State of Florida.'").



poses.<sup>40</sup> Presumably, prosecutors and plaintiffs hoping for justice under the Act will sorely miss a working outline for identifying racially biased crimes. "Educated" racists, such as those faced and mentioned by Representative King, are bound to find solace in such ambiguity. Yet, the Legislature has the power to root out ambiguity without having to bear the difficult task of itemizing racially offensive, enhancement-triggering crimes. The logical way to enforce this law would be to *presume* bias where violent crimes involve interracial offenders and victims. Past case law suggests that the Legislature can create such a presumption while simultaneously creating an affirmative defense for alleged offenders.<sup>41</sup> If defendants shouldered the burden to show a *lack* of racial motivation, the Hate Crimes Act would realize its potential.<sup>42</sup>

Relevant case law supports the conclusion that creating an affirmative defense would not render the Act unconstitutional. In *Patterson v. New York*,<sup>43</sup> the United States Supreme Court upheld the constitutionality of New York's statutory affirmative defense of "extreme emotional disturbance," by which defendants charged with second-degree murder could produce evidence to lessen the charge to manslaughter, a third-degree offense.<sup>44</sup> The two elements of second-degree murder in New York were "intent to cause death" and "causing death."<sup>45</sup> The Court distinguished this case from *Mullaney v. Wilbur*,<sup>46</sup> in which a Maine law was held unconstitutional for placing on the defendant the burden of *disproving* a key element of the crime of murder.<sup>47</sup> The *Patterson* Court upheld the constitutionality of the New York statute because the affirmative defense it created did not serve to negate any elements of the crime of murder as defined by the state legislature.<sup>48</sup> The trial court had already established that the defendant *had* both killed and intended to kill, satisfying both elements of the murder statute.<sup>49</sup>

However, the jury was not convinced that the defendant had killed under the influence of extreme emotional disturbance.<sup>50</sup> The United

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40. See Staff of Fla. H.R. Comm. on Crim. Just., CS for HB 1111 (1989) (creating the Hate Crimes Reporting Act) Staff Analysis 3-4 (final June 6, 1989) (on file with committee).

41. See, e.g., *Patterson v. New York*, 432 U.S. 197 (1977).

42. For an excellent discussion of affirmative defenses in statutes condemning racially motivated crimes, see generally Note, *supra* note 37.

43. 432 U.S. 197 (1977).

44. *Id.* at 198.

45. *Id.*

46. 421 U.S. 684 (1975).

47. *Id.* at 701.

48. *Patterson*, 432 U.S. at 207.

49. *Id.* at 198.

50. *Id.* at 206.

States Supreme Court allowed the affirmative defense of "extreme emotional disturbance" because that defense did not require the defendant to disprove any element of the statutory crime.<sup>51</sup> The Court ruled that a defendant could bear the burden of persuasion for any "separate issue" not considered or proven by the prosecution in a conviction.<sup>52</sup> This holding can be applied to Florida's Hate Crimes Act. Like the New York law, Florida's Act as revised by this Proposal would not specifically name racial prejudice as a new element of any established crime. Rather, it would enhance the penalties for some existing crimes when they are committed interracially.

For example, Florida's Hate Crimes Act as revised might define the enhanced crime of assault as "racial assault," which would be punishable one degree more severely than "assault." Racial assault would consist of two elements as defined by the Legislature: (1) assault with its usual elements, and (2) the commission of such assault against someone of another race. Note that "racism" itself would *not* be an element of racial assault. The statute would go on to provide an affirmative defense that would allow defendants to mitigate their penalty from racial assault to that of simple assault if they could show that the assault was not motivated by racism. In other words, the statute would contain a mandatory presumption that racism motivates interracial assaults. An appropriate jury instruction might state: "If you find that the prosecution has proven beyond a reasonable doubt that (1) the defendant committed an assault, and (2) that this assault was committed against someone of another race, then you must find the defendant guilty of racial assault. However, if the defendant demonstrates [to whatever standard the Legislature imposes] that the defendant acted without racist motivation, you must acquit the defendant of racial assault and reduce the charge to assault." Such a presumption would be constitutional under *Patterson* because it would not affect the prosecutor's burden to prove all elements of the crime beyond a reasonable doubt.

The *Patterson* Court found that premeditation and control of one's mental faculties were not criminal acts within the homicide statute.<sup>53</sup> The Court stated that these factors were neither presumed nor inferred as necessary to constitute the crime.<sup>54</sup> Thus, the Court implied that any opportunity given to the defendant to mitigate a homicide penalty on the basis of mental state was gratuitous.<sup>55</sup> Allowing Florida

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51. *Id.* at 207.

52. *Id.*

53. *Id.* at 205.

54. *Id.* at 205-06.

55. Note, *supra* note 37, at 1277-78 (citing *Patterson*, 432 U.S. 197).

defendants to show a lack of racist motivation, a non-element of racial assault, to mitigate their penalties would be similarly gratuitous. The presumption of racist intent could relieve prosecutors and plaintiffs of the impossible burden contained in this toothless Act as it now exists.

In 1990 the Legislature will consider various amendments to the 1989 Hate Crimes Act. Crimes which evidence sexual prejudice will be considered, as will crimes against homosexuals.<sup>56</sup> Without some legislatively defined direction or procedure, however, these additions will also lack meaning and enforceability. Part I of this Proposal would turn what is now a well-intentioned political act into a law of substantial power and utility for curbing racial violence in Florida. Part II reins this power, keeping it from overrunning the social pedestrians it was meant to transport.

### B. Part II: An Exemption for Minorities

Earlier this Proposal posed several hypotheticals. These included the question of whether enhanced penalties and civil damages should or could apply to *minorities* convicted of racially biased crimes. As it exists now, even in its weakest state, the new Act provides no exceptions for minority offenders.<sup>57</sup>

The most expedient means of removing this ambiguity is to statutorily exempt minority defendants from the presumption of racist intent mandated in Part I. Especially if Part I of this Proposal is adopted, making the statute more widely used, minorities will be subjected to enhanced penalties at a disproportionate rate compared to white offenders because it is the nature of society for majorities to prosecute minorities more frequently and with more vigor than vice versa.<sup>58</sup> Protection from such an imbalance must accompany this proposed amendment.

## III. CONSTITUTIONAL CHALLENGES

One can already hear the shouts of reverse-racism which inevitably challenge such proposals. The published criticism of the Oregon statute was complacent on the issue of equal protection "because it is not written as a racial or ethnic classification [but] applies equally to all

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56. Signing Ceremony, *supra* note 1.

57. See ch. 89-133, § 1, 1989 Fla. Laws 381, 381 (codified at FLA. STAT. § 775.085 (1989)).

58. See generally Comment, *Racially-Motivated Violence and Intimidation: Inadequate State Enforcement and Federal Civil Rights Remedies*, 75 J. CRIM. L. & CRIMINOLOGY 103 (1984) (arguing that failure of state court systems to prosecute and convict perpetrators of racially violent crimes in the 1960s resulted in greater pressure for enforcement by the federal government).

racial and ethnic groups.”<sup>59</sup> The criticism neglected to thoroughly analyze the results of a discriminatory application of such a statute. This Proposal attempts to justify the changes proffered under the watchful eye of equal protection and other anticipated constitutional challenges.

### A. *Equal Protection*

Under the equal protection clause of the fourteenth amendment to the United States Constitution, when a statute discriminates on the basis of a “suspect” class such as race, courts will strictly scrutinize whether the statute is necessary to achieve a “compelling state interest.”<sup>60</sup> However, the majority position in *Regents of the University of California v. Bakke*<sup>61</sup> was criticized for its application of strict scrutiny to a case where a white medical school applicant had been rejected in favor of minority admittees whose test scores and grade point averages were appreciably lower than the white applicant’s. Four concurring justices opined that racial classifications benign to minority groups should be subjected only to intermediate scrutiny if: (1) no fundamental rights are involved; (2) the class disadvantaged by the classification is not part of a “traditional indicia of suspectness”; (3) racial classification is important to the Legislature’s goal; and (4) the classification is not based on a presumption of racial inferiority.<sup>62</sup> Under these criteria, the proposed Hate Crimes legislation would be eligible for intermediate scrutiny.<sup>63</sup>

Even if the *Bakke* majority opinion’s strict scrutiny were applied, requiring a showing of compelling state interest and past societal discrimination to justify racial preferences, this Proposal should nonetheless succeed. In his evaluation of reverse racial discrimination, Professor John H. Ely suggests that legal racial classifications should be viewed in relation to the intent of the framers of the fourteenth amendment.<sup>64</sup> Ely notes that:

[T]he express preoccupation of the framers . . . was with discrimination against *Blacks* . . . Responsible inquiry must seek to

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59. Article, *supra* note 15, at 215.

60. See, e.g., *United States v. Kras*, 409 U.S. 434, 446 (1973).

61. 438 U.S. 265 (1978).

62. Note, *supra* note 37, at 1283.

63. In this author’s opinion, the distinction implicates no fundamental right. The white race is not part of a “traditional indicia of suspectness.” If the Legislature’s goal truly is to curb racism (and to empower minorities), the distinction would certainly be important to the goal. Finally, it would not be based on a presumption of whites’ racial inferiority.

64. Ely, *supra* note 38, at 728.

determine . . . why courts give unusually demanding scrutiny to classifications by which the dominant White majority has advantaged itself at the expense of Blacks, and to what extent those reasons apply where that majority chooses to disadvantage itself in favor of Blacks.<sup>65</sup>

Applying this inquiry to issues such as busing and affirmative action in hiring, Ely concludes that reverse racial discrimination can be justified because these issues often involve benign racial classifications.<sup>66</sup>

Two premises underlying equal protection and the strict scrutiny of racial classifications are: (1) the legal disadvantages that racial and other minorities have historically been subjected to in the United States, and (2) the accepted proposition that racial classifications are "generally . . . irrelevant to any legitimate public purpose."<sup>67</sup> Inserting these explanations into Ely's "reasonable inquiry" equation for strict scrutiny, the proposed classification exempting racial minorities from a presumption of racism appears justifiable. Were the Legislature to classify a crime or presumption as applicable only to racial minority offenders, strict scrutiny would rightfully be applied in evaluating the suspect statute. As stated, this would be yet another example of disadvantaging a minority group with no legitimate public purpose being achieved by the classification. However, a racial classification which presumes racism on the part of only white offenders would constitute a benign racial classification. As a majority group, whites would be disadvantaging only themselves, and they would be doing so to achieve a very legitimate public purpose: instilling racial harmony and human respect where it is sorely lacking.

In *United States v. Carolene Products Co.*,<sup>68</sup> Justice Harlan Stone states that "prejudice against discreet and insular minorities" deserves strict scrutiny by the courts to preserve the protected status of minority groups.<sup>69</sup> The most humanitarian and enduring legislation is that which protects the needs of unrepresented minorities from the wants of a ruling majority. Without equal protection, white democracies could routinely pass laws to disadvantage any minority group to the point of threatening that group's survival. The equal protection clause

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65. *Id.* (emphasis added). Ely admits, though, that historical analysis does not conclude the matter because, given the historical context, the framers of the fourteenth amendment were concerned only with Blacks, although "the equal protection clause has been rightly construed to protect other minorities." *Id.*

66. *Id.* at 727.

67. *Id.* at 731 (quoting Comment, *Developments in the Law— Equal Protection*, 82 HARV. L. REV. 1065, 1108-09 (1969)).

68. 304 U.S. 144 (1938).

69. *Id.* at 152-53 n.4.

should not be a tool for the majority to maintain its hold on power; rather, it should be a tool for the majority to protect the interests of minorities.

### B. Proportionality

If prejudice is presumed, subject only to the affirmative defense, opponents might claim, on eighth amendment grounds, that the new law unconstitutionally promotes excessive punishment.<sup>70</sup> As explained by the Supreme Court in *Solem v. Helm*,<sup>71</sup> any statutory increase in a criminal penalty must be proportional to the crime's elements.<sup>72</sup> In *Solem*, the defendant was convicted of the felony of check fraud after three prior convictions of third-degree burglary, and he was sentenced to life imprisonment under a South Dakota recidivist statute.<sup>73</sup> The Court followed a three-part comparison by which it measured the appropriateness of the penalty. The Court examined: (1) the gravity of the offense and the harshness of the penalty, (2) other penalties imposed in the same jurisdiction, and (3) penalties imposed for the same offense in other jurisdictions.<sup>74</sup> The Court held that the punishment was disproportionate under the eighth amendment, but noted that future challenges would rarely succeed "[o]utside the context of capital punishment."<sup>75</sup>

*Solem's* narrow application has been further limited by the Florida courts. In *Bloodworth v. State*,<sup>76</sup> the First District Court of Appeal disregarded the three-part comparison, distinguishing *Solem* from the sexual battery case before it.<sup>77</sup> The district court noted that "the all-important factor which led the [*Solem*] majority to find an Eighth Amendment violation was the fact that the offense . . . was characterized by the Court as a 'nonviolent felony.'"<sup>78</sup> Similarly, in *Kendry v. State*,<sup>79</sup> the First District Court of Appeal upheld a life sentence for the rapist of a ten-year-old child over the defendant's claim that *Solem* prohibited such a harsh penalty.<sup>80</sup> While admitting that Flori-

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70. The eighth amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments." U.S. CONST. amend. VIII.

71. 463 U.S. 277 (1983).

72. *Id.* at 303.

73. *Id.* at 282.

74. *Id.* at 290-92.

75. *Id.* at 289-90 (quoting *Rummel v. Estelle*, 445 U.S. 263, 272 (1980)).

76. 504 So. 2d 495 (Fla. 1st DCA 1987).

77. *Id.* at 498.

78. *Id.*

79. 517 So. 2d 78 (Fla. 1st DCA 1987).

80. *Id.* at 79.

da's life sentence for sexual battery on a child was a harsher punishment "than [that given by] any state in the union," the district court found a "high correlation between the gravity of the offense and the harshness of the penalty."<sup>81</sup> Hence, Florida case law, even after *Solem*, has relied almost solely on the correlation between the gravity of the offense and the harshness of the imposed penalty in evaluating proportionality.

Interracial crimes not only harm the immediate victims but also threaten society on a larger scale. Racial hatred has consistently led to rioting and social unrest. It has the "capacity to destroy racial harmony, pluralism, and equality . . . . Interracial violence against minorities, regardless of whether it is motivated by racial prejudice, strikes at the heart of these three interests."<sup>82</sup> Certainly the grave results of interracial crimes would justify the Florida courts' upholding the proportionality of this Proposal.

### C. *Freedom of Speech and Association*

The first amendment to the United States Constitution protects free speech and peaceable assembly.<sup>83</sup> This protection was clearly illustrated by the Supreme Court's ruling in *Brandenburg v. Ohio*,<sup>84</sup> which overturned the syndicalism conviction of a Ku Klux Klan leader.<sup>85</sup> The Klansman had spoken at a public rally against what he deemed to be the federal government's suppression of the Caucasian race.<sup>86</sup> He had indicated that "revengeance" [sic] might be called for by fellow Klansmen.<sup>87</sup> The Court held that freedoms of speech and association would be chilled by any statute prohibiting the advocacy of violence, except "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."<sup>88</sup>

The affirmative defense recommended by this Proposal would not have such a chilling effect on first amendment rights. The real chilling effect would be on lawless actions; the presumption created by the

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81. *Id.*

82. Note, *supra* note 37, at 1280-81.

83. The first amendment to the United States Constitution prohibits Congress from making laws that "abridg[e] the freedom of speech, or of the press, or the right of the people peaceably to assemble." U.S. CONST. amend. I.

84. 395 U.S. 444 (1969).

85. *Id.* at 449. Criminal syndicalism is any doctrine advocating, teaching, or aiding and abetting criminal acts, sabotage or violence with the purpose of changing industrial ownership or effecting political change. BLACK'S LAW DICTIONARY 1300 (5th ed. 1979).

86. *Brandenburg*, 395 U.S. at 446.

87. *Id.*

88. *Id.* at 447.

affirmative defense is based on the circumstances of the underlying crime, not on the associations of the defendant. In *Brandenburg*, the defendant had been prosecuted for non-violent actions which took place at a legal assembly. Under this Proposal, however, a defendant's associations would have no bearing on the elements of the underlying crime. The associations would arise only in the context of the defendant's affirmative defense.

#### IV. CONCLUSION

Through the adoption of Committee Substitute for House Bill 1112, the Florida Legislature, dominated by white males, indicated some willingness to place the needs of minority groups above the strained logic of racists. Mere indication of willingness and genuine heartfelt change are two different things, however. "There is nothing suspicious about a majority's discriminating against itself, though we must never relent in our vigilance lest something masquerading as that should in fact be something else."<sup>89</sup> Enacting the suggestions contained in this Proposal would send a message to racists in Florida and to other states that Florida *has* changed and is ready to make sacrifices for racial harmony and social growth: two very legitimate state interests. Whether this message is sent now depends upon the Florida Legislature.

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89. Ely, *supra* note 38, at 741.



